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SUPREME COURT, U.S.

No. 71-16

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD COLBY AND PAUL D. SCOTT, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-10

LEONARD COLEY AND PAUL D. SCOGIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a five-count indictment returned in the United States District Court for the Middle District of Georgia, petitioners, together with codefendants Harper and Crumley, were charged with conspiring to violate federal liquor laws (Count 1) and with substantive offenses involving transportation and possession of nontaxpaid liquor in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (Tr. 1-7).[1] After a jury trial petitioner Coley was found guilty only on the conspiracy charge and petitioner Scogin was found guilty

[1] "Tr" refers to the transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

440-420-71

only on two of the substantive counts (Tr. 324, 326).[2] On June 5, 1970, Coley was sentenced to imprisonment for three years, and Scogin was given concurrent sentences of imprisonment for eighteen months (Tr. 327–329). The court of appeals affirmed the convictions (Pet. App. 1–6). A petition for rehearing was denied on June 1, 1971.

The evidence showed that Bellew, a paid government informant, introduced Farmer, an investigator for the Treasury Department, to petitioner Coley (Tr. 20, 25, 83, 103). On September 26, 1969, Bellew telephoned Coley's home (Tr. 21), holding the telephone in such a way that Farmer could also hear the conversation (Tr. 24). Bellew asked Coley if he could get 10 cases of whiskey, and Coley said he could have them for $27 per case (Tr. 22–23). Thereafter, separate sales of approximately 60 gallons of nontax-paid whiskey were made to Bellew and Farmer on September 30 (Tr. 28–30, 117–122), October 2 (Tr. 31–36, 128–133), and October 9 (Tr. 52–54, 155–158). Scogin assisted in the September 30 delivery (Tr. 28–29, 120).

Prior to the last sale on October 9, 1969, Bellew made three telephone calls to Coley at Coley's residence. In each instance, Bellew gave Farmer permission to make a tape recording of the telephone conversation. Both Bellew and Farmer testified that the substance of those conversations related to a proposed liquor sale (Tr. 37–42, 44–45, 50–51, 136–139). The

[2] Codefendant Harper was found guilty on all five counts, and codefendant Crumley was acquitted on all five counts (Tr. 325).

tape recordings were played and transcriptions of them were received in evidence over defense objection (Tr. 145–149).

Petitioners argue that the admission into evidence of the tape recordings was erroneous because the recordings were the product of an unreasonable search and seizure without a warrant in violation of the Fourth Amendment. This contention is foreclosed by this Court's ruling in *United States* v. *White*, 401 U.S. 745. See also *Rathbun* v. *United States*, 355 U.S. 107.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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